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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

JACK H. KELLY,
Petitioner,
vs.
VINCENT W. KOSUGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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INDEX TO AUTHORITIES CITED

	Page
E. Bement & Sons v. National Harrow Co., 186 U. S. 70	3
Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227	2, 3
Hazelton v. Sheckels, 202 U. S. 71	4
McMullen v. Hoffman, 174 U. S. 639, 649	3
Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U. S. 394	3
Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173	3
United States v. McKesson and Robbins, Inc., 351 U. S. 305	3
United States v. New Wrinkle, Inc., 342 U. S. 371	3
United States v. Paramount Pictures, Inc., 334 U. S. 131	3
United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150	3

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Now comes the petitioner, Jack H. Kelly, by his attorneys, Joseph W. Louisell and Ivan E. Barris, and respectfully petitions this Honorable Court to re-hear the instant appeal for the following reason

BY DISREGARDING THE WELL SETTLED AND LONG ESTABLISHED PRINCIPLE OF LAW THAT A PRICE FIXING AGREEMENT IS ILLEGAL PER SE UNDER THE SHERMAN ANTI-TRUST ACT, THE OPINION OF THE COURT, IF NOT RECONSIDERED, WILL BECOME PRECEDENT FOR THE INHERENTLY DANGEROUS PROPOSITION THAT PRICE FIXING AGREEMENTS WHICH DO NOT RESULT IN UNFAIR, UNREASONABLE OR EXCESSIVE PRICES DO NOT COME WITHIN THE PROSCRIPTION OF THE SHERMAN ANTI-TRUST ACT.

The Opinion of the Court, rendered on February 24, 1959, does not overrule the earlier case of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, but rather seeks to distinguish the case at bar from it upon the fallacious basis that, whereas in the former case the defense of illegality was allowed as an alternative to the Court becoming a party to the carrying out of a price fixing agreement resulting in excessive and unreasonable prices, in the present case the Court may properly enforce the promise of the petitioner to pay the agreed price, not alleged to have been excessive and unreasonable, notwithstanding the promise, as was likewise true in the *Continental* case, *supra*, was part and parcel of a price fixing scheme. It thus appears that this Honorable Court, by implication, at least, has, in sanctioning the enforcement of a price fixing agreement which did not result in unfair, excessive and unreasonable prices, overruled a long line of decisions which have universally held that price fixing agreements resulting in reasonable prices are as equally condemned by the Sherman Anti-Trust Act as are price fixing agreements resulting in unreasonable prices, the decisions being predicated upon the theory that all price fixing agreements, since they tend to stifle eco-

nomic competition, are illegal *per se*.[1] (See, by way of example, *United States v. McKesson and Robbins, Inc.*, 351 U. S. 305; *United States v. New Wrinkle, Inc.*, 342 U. S. 371, *United States v. Paramount Pictures, Inc.*, 334 U. S. 131; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150.)

Furthermore, this Honorable Court, on several occasions in the past, in holding that a plea of illegality based upon a violation of the Sherman Anti-Trust Act may successfully be asserted by a private individual as a defense when sued upon an agreement which is violative of said Act, has so concluded without regard to whether the price fixing agreement resulted in reasonable and fair prices or unreasonable, unfair and excessive prices. (*E. Bement & Sons v. National Harrow Company*, 186 U. S. 70; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173; *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U. S. 394[2].) In fact, in the *Sola* case, *supra*, as well as in the *Katzinger* case, *supra*, to say nothing of the *Continental* case, *supra*, recovery upon the contract which was violative of the Sherman Anti-Trust Act was denied, notwithstanding the promise to pay was, in part, supported by

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[1] In this regard, it is submitted that the Opinion of the Court does violence to the language of Section 1 of the Sherman Anti-Trust Act, the thrust of which is directed against not some but rather *every* contract, combination or conspiracy in restraint of trade. Also to be noted is that in the landmark case of *McMullen v. Hoffman*, 174 U. S. 639, this Honorable Court laid down the sound principle, at 174 U. S. 649, that if contracts are illegal in their nature and tendency, "no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description, or the force of the public policy which condemns them".

[2] These cases were apparently not taken into consideration when it was stated in the Opinion of the Court:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court."

legal consideration, for the announced reason, as was stated in the *Katzinger* case, *supra,* at 329 U. S. 401, that "when one part of the consideration is unenforceable because in violation of law, its integrated companion must go with it", citing *Hazelton v. Sheckels,* 202 U. S. 71.

Inasmuch as the Opinion of the Court fails to advert to any of the above cited cases, except the *Continental* case, *supra,* which the Court attempts to distinguish, and the *Sola* case, *supra,* which is merely cited for the proposition that the effect of illegality under a federal statute is a matter of federal law, and inasmuch as the legal proposition for which these cases have long stood is, without question, the most firmly established in the entire field of Anti-Trust law, counsel for the petitioner are constrained to believe that the present Opinion is the product of this Honorable Court's inadvertent failure to assess the significance of the impact of the rationale of these cases upon the case at bar. It is therefore respectfully urged that, under the foregoing circumstances, to allow the judgment to remain undisturbed would not only result in a manifest injustice to the petitioner, but would also, as a precedent, encourage the future execution of price fixing agreements, with all of their attendant economic evils which the Sherman Anti-Trust Act, as enacted and as interpreted by this Honorable Court, was designed to combat.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Ivan E. Barris, one of the counsel for the petitioner, Jack H. Kelly, does hereby certify that the above petition for re-hearing is brought in good faith and not for delay.

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